8-3-2012

State v. Joy Appellant's Reply Brief Dckt. 38190

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38190
	)	
v.	)	
	)	
PRESTON A. JOY,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Following an argument-turned-fight with his wife, Preston Joy was charged with second degree kidnapping, felony domestic battery, and sexual penetration by a foreign object. Mr. Joy exercised his right to a jury trial.

Prior to, and during, Mr. Joy's trial (wherein Mr. and Mrs. Joy each portrayed the other as the aggressor), the district court made a host of rulings (ten) that Mr. Joy contends were erroneous. Chief among them was the district court's pretrial order allowing the State to offer extensive "prior bad act" evidence pursuant to Idaho Rule of Evidence 404(b).

At the conclusion of his trial, Mr. Joy was found guilty of felony domestic battery; he was acquitted of sexual penetration by a foreign object; and the jury hung on the kidnapping charge. Following the trial, Mr. Joy entered a conditional guilty plea on the kidnapping charge, specifically preserving his right to appeal any and all of the district court's rulings.

On appeal, Mr. Joy asserts that the district court erred in: (1) admitting the "prior bad act" evidence; (2) precluding him from obtaining discovery of certain relevant, exculpatory evidence; (3) committing seven distinct evidentiary errors mid-trial; and (4) failing to instruct the jury on certain lesser-included offenses. He asserts that these errors are prejudicial in their own right but, to the extent that they are not, there was such an aggregation of errors in his case that he was denied a fair trial under the cumulative error doctrine. He asks that his case be remanded for a new trial on the domestic battery and kidnapping charges.

In response, the State argues that no errors occurred in this case and, even if they did, any such errors were harmless. The present Reply Brief is necessary to explain why the State's arguments are without merit.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously set forth in detail in Mr. Joy's Appellant's Brief (pp.1-10) and, therefore, are not repeated herein.

ISSUES

1. Did the district court err in allowing the State to present extensive evidence of alleged "prior bad acts" at Mr. Joy's trial?

2. Did the district court err in preventing Mr. Joy from obtaining discovery of certain exculpatory evidence?

3. Did the district court err in a number of its mid-trial evidentiary rulings?

4. Did the district court err in refusing to instruct the jury on certain lesser included offenses?

5. Did the accumulation of errors in this case deprive Mr. Joy of a fair trial?

ARGUMENT

I.

The District Court Erred In Allowing The State To Present Extensive Evidence Of Alleged "Prior Bad Acts" At Mr. Joy's Trial

A. Introduction

The three felony charges that Mr. Joy faced in this case all arose out of an interaction with his wife occurring on the night of July 28-29, 2009. However, at Mr. Joy's trial, the State also presented copious evidence concerning "bad acts" allegedly committed during four other interactions with his wife over the preceding four months—one in late March or early April of 2009, one on April 10, 2009, one on July 3-4, 2009, and one on July 19, 2009. The district court permitted the State to offer evidence of these "prior bad acts" based on its conclusion that those acts were similar to the actions alleged in this case and, therefore, demonstrated some sort of a "common scheme or plan" on Mr. Joy's part.

Mr. Joy contends that this was error because, no matter how the district court and the State may have attempted to characterize it, the simple fact is that this "prior bad act" evidence is nothing more than evidence of Mr. Joy's bad character and his propensity to commit crimes. As was discussed in Mr. Joy's Appellant's Brief, the mere fact that a defendant has committed similar crimes in the past does not mean that the "prior bad acts" are necessarily part of any sort of common scheme or plan by the defendant. (App. Br., pp.19-22.) Moreover, even if mere similarity were sufficient to demonstrate a common scheme or plan, the fact is that the alleged acts at issue in this case were so dissimilar that they could not be construed as evidencing any sort of common scheme or plan. (App. Br., pp.22-23.) Finally, even if the alleged acts are indicative of a common scheme or plan such that they were relevant to a proper purpose, it was nevertheless error to admit the "prior bad act" evidence because that evidence was so

extraordinarily prejudicial, especially when compared to its probative value. (App. Br., pp.25-31.)

In response, the State argues that the "prior bad act" evidence was, in fact, relevant to a proper purpose—to show a common scheme or plan on Mr. Joy's part or, in the alternative, to show the absence of a mistake or accident on Mr. Joy's part. (Resp. Br., pp.7-13, 15-16.) With regard to its "common scheme or plan" theory, the State urges this Court to ignore the plain meaning of the words "common scheme or plan" and hold that, even in the absence of evidence of an *actual* scheme or plan, "prior bad act" evidence is relevant under the rubric of a common scheme or plan simply because the alleged prior bad acts are similar to the alleged crime. (*See* Resp. Br., pp.9-13.) The State's "absence of mistake or accident" theory is somewhat less clear; however, it seems to be that "prior bad act" evidence is relevant to show knowledge and willfulness because, if the defendant did it intentionally before, he must have intended to do it this time. (*See* Resp. Br., pp.9-10, 15.) The State also argues that the unfair prejudice attendant to the "prior bad act" evidence does not outweigh its probative value, such that the district court did not err in admitting it at trial (Resp. Br., pp.13-15, 16), and that, even if the district court erred in admitting the "prior bad act" evidence, any such error was harmless (Resp. Br., pp.16-17).

Below, Mr. Joy explains why the State's arguments are without merit.

B. The District Court Erred In Admitting The "Prior Bad Act" Evidence

1. The District Court Erred In Its Determination That The "Prior Bad Act" Evidence Was Relevant To A Proper (Non-Propensity) Issue

As noted, the district court found the "prior bad act" evidence to be relevant, primarily because it believed that this evidence was indicative of some sort of a "common scheme or plan" on Mr. Joy's part. However, the district court also arguably found the "prior bad act" evidence

relevant to show the context of the alleged crime in this case. Both of these theories of relevance have been embraced, to an extent,[1] by the State on appeal. (Resp. Br., pp.9-13.) In addition, the State now argues that the "prior bad act" evidence was relevant to show Mr. Joy's knowledge or lack of mistake or accident. (Resp. Br., pp.9-10, 15.)

For the following reasons, none of the State's current theories of relevance is supportable, as the "prior bad act" evidence in this case tended to show only bad character and criminal propensity, neither of which is relevant under I.R.E. 404(b).

a) Common Scheme Or Plan

In his Appellant's Brief, Mr. Joy explained that in light of *State v. Grist*, 147 Idaho 49 (2009), it is now abundantly clear that "prior bad act" evidence which is indicative only of the defendant's propensity to commit crimes or other bad acts may not be admitted in circumvention of I.R.E. 404(b) merely by slapping a "common scheme or plan" label on it. (*See* App. Br., p.16 n.16 (quoting extensively from *Grist*).) He then went on to argue that, given the plain meaning of the words "scheme" and "plan" as used in Rule 404(b), it is incumbent upon the State, when seeking to offer "prior bad act" evidence against the defendant, to show (or at least raise a reasonable inference of) an actual scheme or plan on the defendant's part[2]; he asserted that mere similarity of the alleged offense to the alleged prior bad act(s) is not necessarily sufficient to invoke the "common scheme or plan" exception to Rule 404(b)'s general prohibition against admission of "prior bad act" evidence. (App. Br., pp.19-22.) Accordingly, he argued that the

[1] The State has chosen to roll this "context" theory into its argument that the alleged "prior bad acts" were part of a common scheme or plan, rather than attempt to invent a new theory of relevance for "prior bad act" evidence. (*See* Resp. Br., pp.12-13.)

[2] The State has mischaracterized Mr. Joy's argument as attempting to engraft a "premeditation" requirement onto the "common scheme or plan" exception to Rule 404(b). (Resp. Br., p.12.) The State, apparently, completely misses the point of Mr. Joy's argument. He has not asserted that any particular crime or other bad act need be shown to have been premeditated, only that an actual scheme or plan existed. (*See* App. Br., pp.19-22.)

district court erred in admitting the copious "prior bad act" evidence in this case based solely on its conclusion that the alleged prior bad acts were similar to the charged offenses. Mr. Joy also argued, in the alternative, that if similarity alone is sufficient for the State to exploit the "common scheme or plan" exception to Rule 404(b), the district court nonetheless erred because the alleged prior bad acts in this case were not sufficiently similar to the charged offenses. (App. Br., pp.22-23.)

Notably, the State is still unable to come up with any theory under which the alleged prior bad acts and the charged offenses in this case were actually part of a common scheme or plan, as those terms are commonly understood. (*See generally* Resp. Br., pp.6-17.) Rather, the State argues that mere similarity (couple, apparently, with temporal proximity) satisfies the "common scheme or plan" exception even if it is readily apparent that no actual scheme or plan ever existed. (*See* Resp. Br., pp.10-12.) In other words, the State would have this Court read "plan," as used in Rule 404(b) to not mean "plan." Obviously, Rule 404(b) cannot be so interpreted. *Cf. Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892-93 (2011) (rejecting the notion that a statute can be interpreted to mean something other than that which its plain language suggests simply because the reviewing court finds its policy to be unsound). Furthermore, as noted, *Grist* made it abundantly clear that "prior bad act" evidence cannot be labeled "common scheme or plan" evidence just to "serve [propensity evidence] up under a different name." *Grist*, 147 Idaho at 55.

b) Context

As noted in Mr. Joy's Appellant's Brief (pp.24-25), the district court appears to have found that the "prior bad act" evidence was relevant, not only to show a "common scheme or plan," but also to put the facts of this case in context. Specifically, the district court concluded that "the charged conduct is so aberrant that it would be difficult for jurors to place that conduct

or reconcile that conduct out of context unless you have some understanding of what the overall relationship has been like, at least in the four months prior to this event." (Tr., p.73, L.22 – p.74, L.2.) With regard to this ruling, Mr. Joy has argued that the district court's reasoning was not a valid basis for finding "prior bad act" evidence relevant under Rule 404(b) and, besides, was illogical because there is nothing about Mrs. Joy's testimony that was so confusing as to require an explanation based on alleged instances of prior domestic violence. (App. Br., pp.24-25.)

In response, rather than treat or attempt to treat the district court's "context" rationale as a separate basis for finding the "prior bad act" evidence relevant under Rule 404(b), the State has adopted the "context" reasoning as part of its "common scheme or plan" argument. (*See* Resp. Br., pp.12-13.) The State argues that "the dynamics and context of domestic violence are outside the ken of the average juror," and suggests that, because domestic violence is so inherently confusing, a lay juror would be baffled by an alleged victim's straightforward testimony that she was abused by her domestic partner, and the jury could only make sense of this testimony if it also heard copious evidence of prior abuse. (*See* Resp. Br., pp.12-13.)

The State's argument fails. The cases cited by the State for the proposition that "the dynamics and context of domestic violence are outside the ken of the average juror" deal with a scenario wholly inapposite to the facts of this case—the use of expert testimony concerning "Battered Women's Syndrome." In *Commonwealth v. Goetzendanner*, 679 N.E.2d 240 (Mass. Ct. App. 1997), the victim in a domestic violence case sought to offer the testimony of an expert on Battered Women's Syndrome to explain that which is very counterintuitive—why she did not leave her domestic relationship if she contended that she had been the victim of domestic violence—where it was anticipated that her abuser would attempt to use her failure to sever the relationship as evidence that no abuse had actually occurred). *Id.* at 243-46. Likewise, in

State v. Varie, 135 Idaho 848 (2001), the issue concerned the admissibility of expert testimony on Battered Women's Syndrome—this time, to explain, as part of a self-defense theory, why the defendant, a domestic violence victim, killed her husband instead of simply leaving the relationship. *Id.* at 853-55.

Unlike *Goetzendanner* and *Varie*, Battered Women's Syndrome has no application in this case, and there is nothing complicated or counterintuitive about the evidence in this case; the only question was whether Mr. Joy perpetrated the crimes that his wife claims he did on July 28-29, 2009, which was a straightforward "he said/she said" dispute. In light of this, the history of the Joys' relationship and, in particular, any alleged past domestic violence was wholly irrelevant and unnecessary to the jury's deliberative process.

c) Knowledge, Lack Of Mistake, Or Accident

On appeal, the State offers a third basis to find the "prior bad act" evidence relevant to something other than propensity or character—to show that Mr. Joy had knowledge that his alleged anal penetration of his wife was against her will (Resp. Br., p15 ("Joy would have been aware that the charged sexual penetration was not consensual, because it was not consensual in the prior instance.")), and to show that Mr. Joy's infliction of injuries upon his wife was not the result of a mistake or accident on his part (Resp. Br., pp.9-10). This argument, however, is unconvincing.

The State's "knowledge" argument is illogical. First, the crime of forcible penetration by use of a foreign object contains no requirement that the defendant have knowledge that his actions are against the will of the defendant. *See* I.C. § 18-6608. Second, even if Mr. Joy's knowledge was something that was relevant, the State's argument fails to explain how Mr. Joy's alleged anal rape of his wife in early April 2009 would have given him knowledge that a sexual penetration of her anus with a dildo at the end of July 2009 was not consensual. (*See* Resp.

Br., p.15.) If the first alleged act occurred, and was against Mrs. Joy's will, this in no way informs the question of whether she consented to a subsequent act on a different day.

Likewise, the State's "lack of mistake or accident" argument fails. The State theorizes that past instances of domestic violence show that the injuries suffered by Mrs. Joy on July 28-29, 2009 were no accident. (Resp. Br., pp.9-10.) The State asserts that "[d]omestic violence is never a single isolated incident" (Resp. Br., p.9 (quoting Jane H. Aiken & Jane C. Murphy, Evidence Issue in Domestic Violence Civil Cases, 34 Fam. L.Q. 43, 56 (2000))), and it explains that "[t]he nature of the relationship between Joy and his wife, as shown through the recent acts of abuse committed by Joy against his wife, was relevant to helping the jury decide who the initial aggressor was." (Resp. Br., p.9; *see also* Resp. Br., p.10 ("[W]here the defense argued that the victim was the initial aggressor and/or caused her own injuries, the history and pattern of abusive behavior were absolutely relevant to determining material and disputed issues in the case.").) In other words, it is the State's contention that evidence of the past alleged instances of domestic violence was relevant because it allowed the jury to infer that since Mr. Joy abused his wife previously, he was probably the aggressor in this case as well. (*See* Resp. Br., pp.9-10.) This, however, is precisely the type of propensity evidence that is expressly prohibited by the Idaho Rules of Evidence. *See* I.R.E. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. . . .")

2. Probative Value vs. Prejudicial Effect

In his Appellant's Brief, Mr. Joy argued fairly extensively that, even if the "prior bad act" evidence was somehow relevant, because it had minimal probative value, if any, and was extremely prejudicial, it should have been excluded. (App. Br., pp.25-31.) In response, the State can say little. Other than the relevance argument discussed above, it makes no argument

concerning any purported probative value of the "prior bad act" evidence. (*See generally* Resp. Br., pp.13-15, 16.) And, with regard to the prejudicial effect of that evidence, the State ignores the fact that the "prior bad act" evidence was copious and permeated the entire trial, as well as the fact that the prosecution's case was relatively weak and turned almost completely on the testimony of an alleged victim who, by the prosecutor's own admission, had significant credibility problems; instead, the State focuses exclusively on the fact that the district court gave the jury the pattern limiting instruction for "prior bad act" evidence (ICJI 303). (*See* Resp. Br., pp.13-15, 16.) The State argues, primarily, that because this Court must presume that the jury followed the limiting instruction, there is minimal risk that the jury considered the "prior bad act" evidence for anything other than a proper purpose, *i.e.*, motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Resp. Br., pp.14, 16.)

This simplistic argument by the State, however, overlooks a number of key considerations. First, as was discussed in some detail in Mr. Joy's Appellant's Brief, limiting instructions do not automatically cure all prejudice. (*See* App. Br., pp.29-30 (*citing State v. Pokorney*, 149 Idaho 459 (2010), *State v. Johnson*, 148 Idaho 664 (2010), and *State v. Sheldon*, 145 Idaho 225 (2008).) A recent Idaho Court of Appeals decision on the related question of curative instructions is instructive:

> [A]lthough we normally presume that a jury will follow an instruction to disregard inadmissible evidence, this presumption cannot shield all errors from appellate review, regardless of the severity of the error or the forcefulness and effectiveness of the instruction. As the United States Supreme Court has recognized:
>
> > [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.
>
> *Bruton v. United States*, 391 U.S. 123, 135 . . . (1968). We have similarly noted that where the evidence presents a close question for the jury, "a corrective

> instruction, even one that is forceful, might be insufficient to cure the prejudicial effect" of very damaging evidence. *State v. Keyes*, 150 Idaho 543, 545 . . . (Ct. App. 2011).

State v. Watkins, 152 Idaho 764, __, 274 P.3d 1279, 1282-83 (Ct. App. 2012).

Second, as was also mentioned in Mr. Joy's Appellant's Brief, the limiting instruction actually given in this case was relatively weak and, therefore, less likely to be effective. (*See* App. Br., p.30 (pointing out that the evidence in question was not specifically identified for the jurors).) That instruction was not contemporaneous with admission of the "prior bad act" evidence; it was not given until the rest of the post-proof instructions were given after the close of the evidentiary portion of the trial. (*See* Tr., p.663, L.23 – p.664, L.11.) Furthermore, it did not specifically identify the "prior bad act" evidence in question, or the non-propensity purpose for which it was supposedly admitted.[3] (*See* Tr., p.663, L.23 – p.664, L.11; R., p.269.)

Under these circumstances, it is highly unlikely that the district court's limiting instruction did anything to diminish the copious, extremely prejudicial "prior bad act" evidence offered against Mr. Joy in this case.[4]

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[3] The State contends that Mr. Joy has no right to complain about the form of the limiting instruction, as he was the one who requested it. Specifically, the State asserts that any error in instructing the juror was invited error because Mr. Joy requested the limiting instruction. (Resp. Br., p.14.) While it is true that Mr. Joy included a request for ICJI 303 in his proposed jury instructions (R., p.142), the State's "invited error" argument is misplaced. Mr. Joy has not challenged the giving of Instruction No. 14b (ICJI 303) as an error on appeal; he has merely explained why that instruction was insufficient to cure the district court's error in admitting the "prior bad act" evidence in the first place. Under these circumstances the invited error doctrine has no application. *See State v. Blake*, 133 Idaho 237, 240 (1999) ("The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to give or not give an instruction from later challenging that decision on appeal.").

[4] The State also asserts that Mr. Joy's acquittal on the sexual penetration charge proves that there was no prejudice attendant to admission of Mrs. Joy's testimony concerning the alleged anal rape. (Resp. Br., p.16.) This argument is also without merit. Although the State would have this Court believe that the testimony concerning the alleged anal rape was relevant to, and considered in conjunction with, only the sexual penetration charge, the fact is that all "prior bad act" evidence tending to portray the defendant as man of bad character with a propensity to commit crimes of violence is prejudicial with regard to all of the charges. Just because the jury acquitted

C. The District Court's Error In Admitting The "Prior Bad Act" Evidence Was Not Harmless Beyond A Reasonable Doubt

Just because the district court erred in admitting certain evidence, that error, in and of itself, does not *necessarily* compel a new trial. The Idaho Criminal Rules provide that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52; *see also Chapman v. California*, 386 U.S. 18 (1967) (holding that even a constitutional error may be so minor in terms of its effect that it may be deemed harmless). This is the "harmless error" rule.

In *State v. Perry*, 150 Idaho 209, 221-22 (2010), the Idaho Supreme Court held that "the harmless error test established in *Chapman* [*v. California*] is now applied to all objected-to error," regardless of whether the error is of a constitutional dimension or, instead, is an error under Idaho law. Under *Chapman*, once an error has been established, it is incumbent upon the government to show, "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Perry*, 150 Idaho at 221 (*quoting Chapman,* 386 U.S. at 24). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt,* 500 U.S. 391, 403 (1991). The issue is whether the jury actually rested its verdict on evidence beyond a reasonable doubt, independently of the inadmissible evidence. *Id.* at 404-05. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993).

Mr. Joy on the sexual penetration charge does not mean that the testimony concerning the alleged anal rape did not influence is verdict on the other two charges.

In this case, the State argues that, to the extent that the district court erred in admitting the "prior bad act" evidence, any such error was harmless. The State's argument in this regard is cursory, resting solely on the premise that "[t]he state presented overwhelming evidence establishing Joy's guilt on the charge of domestic violence." (Resp. Br., p.17.) This brief argument, however, is unpersuasive.

Preliminarily, it is worth noting that the State misapprehends the *Chapman* standard. By asserting that the error was harmless because "[t]he state presented overwhelming evidence," the State is essentially arguing that, had the error not occurred, Mr. Joy would surely have been found guilty anyway. (*See* Resp. Br., p.17.) However, as noted above, in *Sullivan v. Louisiana*, the United States Supreme Court expressly rejected such a construction of the *Chapman* standard. As noted, the actual standard is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan,* 508 U.S. at 279.

More importantly, under the correct standard, it is readily apparent that the State cannot meet its burden of proving beyond a reasonable doubt that the error in admitting the "prior bad act" evidence did not contribute to the jury's verdict on the domestic violence charge. As has been noted, this was an extremely close case, even by the prosecutor's own admission. (*See* Tr., p.65, Ls.1-19 (prosecutor acknowledging that the alleged victim's testimony was the most critical evidence in the case and that this was not an "an open-and-shut type of case for the State); see also Tr., p.71, Ls.15-18 (district court discussing the relative weakness of the State's case).) In addition, the State's key witness, Mrs. Joy, had significant credibility problems. (*See* Tr., p.147, Ls.1-17 (prosecutor conceding that Mrs. Joy would "be impeached six ways from Sunday").) Indeed, the jury clearly did not believe all of Mrs. Joy's testimony, as it found Mr. Joy guilty on only one count, acquitting him on a second and hanging on a third. Under

these circumstances, Mr. Joy submits that the highly prejudicial "prior bad act" evidence could very well have contributed to the jury finding him guilty on the domestic violence charge.

II.

The District Court Erred In Preventing Mr. Joy From Obtaining Discovery Of Certain Exculpatory Evidence

A. Introduction

Prior to his trial, Mr. Joy sought access (through a subpoena *duces tecum*) to the computer that he and his wife owned. He asserted that the computer contained images of he and his wife engaged in consensual sex involving bondage, which would explain the ligature marks on Mrs. Joy's ankles and wrists on the night that Mr. Joy was alleged to have committed the crimes at issue in this case, as well as the consensual insertion of a dildo into Mrs. Joy's anus, which would not only tend to show that any such activity on the night in question was consensual, but would also impeach Mrs. Joy's statement to the police that she had never allowed Mr. Joy to insert a dildo into her anus.

When the State filed a motion to quash Mr. Joy's subpoena *duces tecum*, rather than evaluate that motion (and a subsequent motion for reconsideration) under the standard set forth in I.C.R. 17(b) (the rule concerning subpoenas *duces tecum* and the quashing of such subpoenas), the district court sought to determine whether the evidence on the computer was admissible at trial and, concluding that it was not, granted the State's motion. Consequently, the computer was never turned over to Mr. Joy and his counsel, and the exculpatory evidence was never disclosed.

Mr. Joy contends that the district court erred in quashing his subpoena *duces tecum*. Specifically, he contends that the district court erred in failing to engage in the appropriate analysis under I.C.R. 17(b) and that, under the appropriate Rule 17(b) analysis, it was error to quash the subpoena. (App. Br., pp.35-40.)

In response, the State offers three arguments. First, the State asserts that the contents of the computer were only relevant to the sexual penetration charge and, since Mr. Joy was acquitted of that charge, his claim concerning the fact that that computer was withheld from the defense is now moot. (Resp. Br., pp.18-19.) Second, the State claims that, to the extent that Mr. Joy's claim is justiciable, the district court was ultimately correct in quashing his subpoena.[5] (Resp. Br., pp.20-21.) Finally, the State argues that any error in quashing the subpoena is harmless. (Resp. Br., pp.21-22.)

Below, each of the State's arguments is addressed in turn, and Mr. Joy explains why none of them have merit.

B. Mr. Joy's Claim Is Justiciable

The State contends that, because Mr. Joy was ultimately acquitted on the sexual penetration charge, his claim regarding the quashing of his subpoena *duces tecum* is necessarily moot. (Resp. Br., pp.18-19.) This argument is based on the assumption that the only relevant data on the computer in question were images of Mrs. Joy engaging in consensual anal penetration with a dildo. (*See* Resp. Br., p.29.)

The State's assumption, however, is unsound. Preliminarily, it is worth noting that the images on the computer depict Mrs. Joy using a dildo anally would have done more than raise the inference that any sex acts that occurred on the night in question were consensually undertaken; they also would have impeached Mrs. Joy's statement to the police that she had never used a dildo anally before. (*See* R., p.127; Tr., p.82, Ls.1-6, p.91, L.6 – p.93, L.14.) And any additional impeachment of Mrs. Joy would have reflected on her credibility generally,

[5] The State characterizes the district court's action as modifying the subpoena, rather than quashing it. (Resp. Br., pp.20-21.) The State reasons that since the district court eventually ordered the computer turned over to the State instead of the defense, as the subpoena would have required, the district court did not really quash the subpoena. (Resp. Br., p.20.)

making her less likely to be believed by the juror—not just with regard to the sexual penetration charge, but also with regard to the charges on which Mr. Joy was not acquitted.

Furthermore, as is discussed in Mr. Joy's Appellant's Brief (pp.36-38), because there is reason to believe that the computer also contained images of consensual sexual bondage,[6] that material would have been relevant to the kidnapping charge (insofar as the jury might find that Mrs. Joy was tied up against her will, and that this constituted kidnapping). It also would have been relevant to Mrs. Joy's credibility (as the State presented evidence suggesting that she had indicated that the ligature marks on her wrists and her ankle resulted from Mr. Joy tying her up against her will (*see* Tr., p.327, Ls.9-11)) which, as noted, is relevant to all the charges for which Mr. Joy stood trial.[7]

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[6] The State claims that "Joy's claim that this evidence [images of consensual sexual bondage] would explain his wife's ligature marks is unsupported" because, ultimately, "officers never recovered any photographic evidence of sexual bondage on the computer." (Resp. Br., p.19.) Obviously, without ever having had access to the exculpatory evidence on the computer, Mr. Joy was unable to make a definitive record as to what was on that computer. However, Mr. Joy undoubtedly had personal knowledge of the contents of the computer and, based on this personal knowledge (presumably), the defense made numerous offers of proof indicating that the computer contained images of consensual sexual bondage. (*See, e.g.*, R., p.149; Tr., p.91, L.6 – p.92, L.9, p.116, Ls.19-24, p.120, L.7 – p.122, L.16.) Under these facts, Mr. Joy's representations ought to be given significant weight. This is especially true where, as here, the State's forensic review of the computer was apparently incomplete (*see* Tr., p.140, L.24 – p.151, L.19 (discussing the contents of the computer recovered to that point and eventually indicating that, if the State were to turn the computer over to the defense, the State would need an additional five days to "Scrub" the computer)) and, therefore, even the State, cannot say definitively that the computer does not contain images depicting Mrs. Joy engaged in consensual sexual bondage.

[7] The State attempts to foreclose this Court's consideration of Mr. Joy's argument "that images of sexual bondage would explain the ligature marks and thereby rebut the claim of domestic violence" by asserting that this precise argument was not made below and, therefore, cannot be considered on appeal. (Resp. Br., p.19 (citing App. Br., p.32).) This attempt at a procedural bar is without merit though, as there is a fundamental distinction between raising a new issue on appeal (which is not allowed), and simply expanding upon the arguments made below (which is permissible). *State v. Voss*, 152 Idaho 148, 150 (Ct. App. 2011). In this case, the issue is the same—whether the district court erred in precluding Mr. Joy from obtaining discovery of

C. The District Court Erred In Quashing Mr. Joy's Subpoena *Duces Tecum*

As noted in Mr. Joy's Appellant's Brief, the district court erred in two respects when it granted the State's motion to quash the subpoena (and, later, denied Mr. Joy's motion to reconsider). First, it abused its discretion when, although it was confronted with the correct standard for evaluating motions to quash subpoenas under Rule 17(b), it declined to apply that standard, opting, instead, to quash the subpoena based on standards of admissibility. (App. Br., pp.35-36.) Second, under the correct standard, the subpoena should not have been quashed. (App. Br., pp.36-39.)

In response to Mr. Joy's first argument, the State contends that it simply does not matter that the district court applied the wrong standard because, where the district court reaches the correct result based on the wrong theory, the appellate court can nonetheless affirm the district court's ultimate decision on the correct theory. (Resp. Br., p.20.) Mr. Joy submits, however, that the State's argument is misplaced. Whatever merit the State's argument might have with regard to legal questions that are reviewed *de novo* on appeal, it has no applicability here, where the district court was required to exercise its discretion in determining whether to quash Mr. Joy's subpoena. If this Court were to entertain the State's invitation to conduct a "right result/wrong reason" analysis in this case, it would necessarily have to substitute its own discretion for that of the district court because the district court never took the opportunity to exercise its discretion under the appropriate legal standard. The State identifies no authority to support the notion that that an appellate court may make a discretionary decision not made by the district court in order to sustain a decision made by the district court on an incorrect legal

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exculpatory evidence; at most, the argument has changed slightly (and only to the extent that different facts are highlighted).

theory.[8] In fact, a number of cases hold that an appellate court is *not* to substitute its own discretionary decision for that of the trial court. *See, e.g., Nelson v. Nelson*, 144 Idaho 710, 717 (2007) (in reviewing child custody determinations, "[e]ach case requires this Court to determine whether the magistrate abused his or her discretion, not whether this Court would have made the same decision"). Thus, it ought not to be surprising that in recent cases where the Idaho Supreme Court has found that the district court has applied the wrong legal standard in evaluating the admissibility of evidence, it has remanded the case instead of applying its own discretion within the framework of the appropriate standard. *See, e.g., State v. Ruiz*, 150 Idaho 469, 471 (2010); *State v. Meister*, 148 Idaho 236, 241 (2009).

In response to Mr. Joy's second argument, the State asserts that the subpoena was properly "modified" (*see* note 5, *supra*) because unless or until evidence, embarrassing to the alleged victim, becomes relevant, a criminal defendant need not see it, or even know what it is. (Resp. Br., pp.20-21.) This argument rests on the belief that, "[u]nless the photos became relevant at trial, the only purpose for Joy to possess them would have been to embarrass or intimidate the victim."[9] (Resp. Br., p.20.) This, however, is an absurd belief, as it presumes that the accused can reasonably rely on the trial court (which, in this case, was not privy to the contents of the computer and had already erred in applying the wrong legal standard in quashing Mr. Joy's subpoena) and the prosecutor (a zealous advocate for the State), instead of his own counsel, to safeguard his rights. Moreover, as was discussed in Mr. Joy's Appellant's Brief (p.39), the State's "embarrassment" and concern appears vastly overblown when one considers

[8] The State appears to be attempting to have this Court decide whether it would, in its discretion, have quashed Mr. Joy's subpoena, a decision that was not made by the district court under the applicable standard, and then rely upon such a decision to uphold the district court's actual decision in this case.

that: (a) the images were ultimately viewed by one or more strangers (police officers) anyway; (b) Mr. Joy had already seen the images of his wife; (c) the district court could have easily sealed the evidence; and (d) whatever embarrassment Mrs. Joy may feel about the dissemination of the images in question, it likely pales in comparison to the embarrassment that comes with being accused of the crimes that Mr. Joy was charged with in this case (and that is to say nothing of the emotional trauma of being arrested, tried and convicted, and sentenced to a lengthy period of incarceration). The simple fact is that there was absolutely no good reason why Mr. Joy should have been denied access to *his own* computer, which was known to contain exculpatory evidence.

D. The District Court's Error In Quashing Mr. Joy's Subpoena *Duces Tecum* Was Not Harmless[10]

As an alternative to its argument that the district court did not err in "modifying" Mr. Joy's subpoena, the State asserts that any error the district court may have made was harmless beyond a reasonable doubt. (Resp. Br., pp.21-22.) The State offers three bases in support of this claim:

> First, the district court secured the evidence sought, making it available to him at trial if it became relevant, so Joy's substantive right to present evidence in his defense was not affected . . . . Second, the evidence itself never became relevant at trial . . . , so the district court's analysis did not affect the ultimate outcome of the trial. Third, . . . the jury ultimately acquitted [Mr.] Joy of the charge which he claimed the evidence he sought was relevant to rebut . . . .

(Resp. Br., p.22.) The State's analysis, however, is flawed.

As is noted above, the contents of the Joys' computer, *i.e.*, the images depicting Mrs. Joy using a dildo anally and engaging in consensual sexual bondage, were relevant to more than just

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[9] The State's suggestion that Mr. Joy sought access to the exculpatory evidence on the computer in an effort to intimidate his wife is a scurrilous and utterly baseless allegation.

[10] The harmless error standard was discussed in Part I(C), *supra*, as well as Part IV(E) of his Appellant's Brief. That standard is incorporated herein by this reference.

the charge of sexual penetration; the bondage images were directly relevant to the kidnapping charge, and all of the images were relevant to Mrs. Joy's credibility. And, because, as noted, this case was a prototypical "he said/she said" case, where the "she" was not particularly credible, and the jury clearly didn't believe at least some of what "she" said, the State cannot meet is burden of proving, beyond a reasonable doubt, that the district court's error did not contribute to the jury's verdict.

III.

The District Court Erred In A Number Of Its Mid-Trial Evidentiary Rulings

During the course of Mr. Joy's trial, the district court was asked to make myriad evidentiary rulings. Mr. Joy contends that in at least seven instances, the district court erred in its rulings. First, it erred in allowing Mrs. Joy to read a large portion of her preliminary hearing testimony into the record. Second, it erred in allowing one of the detectives to recite numerous out-of-court statements made by Mrs. Joy in her interview with the police. Third, it erred in precluding Mr. Joy from repeating one of his out-of-court statements made to the police. Fourth, it erred in admitting an exhibit for which an inadequate foundation had been laid. Fifth, it erred in allowing the prosecutor to elicit irrelevant, highly prejudicial evidence, which went beyond the scope of direct examination, in cross-examining Mr. Joy. Sixth, it erred in allowing the prosecutor to question Mr. Joy regarding another witness's beliefs. And seventh, it erred in allowing the prosecutor to badger Mr. Joy during cross-examination.

In response, the State goes through each of Mr. Joy's claims of error in turn and argues that the district court did not err and, even if it did, its error was harmless. (*See* Resp. Br., pp.22-34.)

For the reasons set forth fully below, the State's arguments are without merit and this Court should conclude that the district court erred.

A. The District Court Erred In Allowing Mrs. Joy To Read A Large Portion Of Her Preliminary Hearing Testimony Into The Record At Trial

Mr. Joy contends that the district court erred in allowing Mrs. Joy to read a significant portion of her preliminary hearing transcript into the record at his trial; he asserts that the preliminary hearing testimony read into the record was inadmissible hearsay. (*See* App. Br., pp.40-45.) Specifically, he argues that that prior testimony was not admissible as prior consistent statements under I.R.E. 801(d)(1)(B) because there was no express or implied charge against Mrs. Joy of recent fabrication or improper influence or motive, primarily because Mrs. Joy's motive to lie pre-dated her preliminary hearing testimony. (App. Br., pp.43-45.)

In response, the State apparently concedes that the preliminary hearing testimony was inadmissible under I.R.E. 801(d)(1)(B). (*See* Resp. Brief, p.24 (declining to make an argument under Rule 801(d)(1)(B), p.27 (conceding elsewhere in its brief that, "[i]n order to be admitted under Rule 801(d)(1)(B), the out-of-court statement must be a statement of some sort that precedes the alleged fabrication or motive to lie").) However, the State argues for the first time that this testimony was admissible under I.R.E. 106, which provides as follows: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be contemporaneously considered with it." (Resp. Br., p.24 (quoting I.R.E. 106).) The State reasons very simply that since, "[i]n cross-examination, the defense asked questions about the victim's recorded statement from the preliminary hearing transcript," fairness dictated that, on re-direct, the prosecution be allowed to "introduce the victim's related testimony from the preliminary hearing transcript to place those answers into their context . . . ." (Resp. Br., pp.24-25.) The State is incorrect.

In *State v. Fain*, 116 Idaho 82 (1989), the Idaho Supreme Court made it clear that Rule 106 only allows admission of those parts of the writing or record statement that are relevant to what was already introduced. *Id.* at 86. In this case, however, the State used portions of the preliminary hearing transcript that were, generally speaking, in no way relevant to the matters on which Mrs. Joy had been cross-examined. (*Compare* Tr., p.383, L.20 – p.384, L.13 (cross-examination concerning preliminary hearing testimony regarding whether Mrs. Joy's hands were pinned behind her back or at her sides during one of the alleged "prior bad act" incidents) *and* Tr., p.387, Ls.17-20 (cross-examination concerning preliminary hearing testimony regarding a wrist injury in another of the alleged "prior bad act" incidents) *and* Tr., p.397, L.6 – p.399, L.4 (cross-examination concerning preliminary hearing testimony regarding whether the tub was full or empty when Mrs. Joy was supposedly tied up) *with* Tr., p.411, L.3 – p.416, L.8 (re-direct examination wherein Mrs. Joy read a significant portion of her prior testimony, relating to numerous matters concerning the incident with which Mr. Joy was charged in this case, including only a brief reference to the question of whether the tub was full when she was tied up, and not addressing any of the "prior bad act" incidents).) In other words, the portions of Mrs. Joy's preliminary hearing testimony that were read into the record at Mr. Joy's trial did not provide context to the portions of her testimony on which she had been cross-examined by the defense. Clearly, the State sought to offer that testimony to show that Mrs. Joy had previously given some testimony that was consistent with her trial testimony and, thereby, bolster her credibility. But this, of course, is not the purpose of Rule 106.

B. The District Court Erred In Allowing Detective March To Recite Numerous Out-Of-Court Statements Made By Mrs. Joy To The Police

Mr. Joy contends that the district court erred in allowing Detective March to testify as to out-of-court statements made by Mrs. Joy; he asserts that these statements were inadmissible

hearsay. (App. Br., pp.45-46.) As with the preliminary hearing testimony read into the record, he argues that the statements testified to by Detective March were not admissible as prior consistent statements under I.R.E. 801(d)(1)(B) because there was no express or implied charge against Mrs. Joy of recent fabrication or improper influence or motive, primarily because Mrs. Joy's motive to lie pre-dated her preliminary hearing testimony. (App. Br., p.46.)

In response, the State concedes that the preliminary hearing testimony was inadmissible under I.R.E. 801(d)(1)(B). (*See* Resp. Brief, p.25; *see also* Resp. Br. 27 ("In order to be admitted under Rule 801(d)(1)(B), the out-of-court statement must be a statement of some sort that precedes the alleged fabrication or motive to lie.").) However, the State argues that this testimony was "admissible for the purpose of attacking and supporting Mrs. Joy's credibility." (Resp. Br., pp.25-26.) In support of this argument, the State relies upon Idaho Rules of Evidence 613(b) and 806, as well as two Court of Appeals decisions: *State v. Howell*, 137 Idaho 817 (Ct. App. 2002), and *State v. Martinez*, 128 Idaho 104 (Ct. App. 1995). (Resp. Br., p.26.)

Mr. Joy must confess that he does not understand the State's argument concerning Rule 613(b) and 806; however, it appears that they lack merit. Rule 613(b) merely provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon . . . ." I.R.E. 613(b). In this case, Detective March's testimony was not extrinsic evidence of a prior inconsistent statement; it was evidence of prior *consistent* statements. Nor was Detective March's testimony an explanation by the witness whose prior inconsistent statements had been admitted. Likewise, Rule 806 has no applicability. That Rule appears to state simply that the credibility of a non-testifying hearsay declarant may be attacked and supported to the same extent as if he or she had actually testified;

it is not a vehicle by which a party may hearsay statements that are otherwise inadmissible. *See* I.R.E. 806.

The State's reliance on *Howell* and *Martinez* is more understandable though. Both of those cases hold that prior consistent statements are always admissible to rehabilitate a witness' credibility because, when so offered, they are not offered for the truth of the matters asserted therein and, therefore, do not meet the definition of hearsay. *Howell*, 137 Idaho at 821; *Martinez*, 128 Idaho at 109. Nevertheless, the State's argument fails under the facts of this case. First, the prosecutor never indicated that it was offering Detective March's testimony for the limited purpose of allowing the jury to evaluate Mrs. Joy's truthfulness and, overruling the defense objection to this testimony, the district court did not indicate that the evidence was being admitted for a limited purpose; nor did it instruct the jury that it could only consider Detective March's testimony for a limited purpose. (*See* Tr., p.455, L.6 – p.461, L.7.) Second, the rule of *Howell* and *Martinez* has no logical application here,[11] where the motive for Mrs. Joy to lie pre-dated her prior consistent statements. In other words, statements made under such circumstances do not enhance the credibility of the witness and, therefore, unless admitted for the truth of the matter asserted, are wholly irrelevant.

In light of the foregoing, as well as the arguments made in Mr. Joy's Appellant's Brief, it is apparent that the district court erred in allowing Detective March to testify as to Mrs. Joy's out of court statements.

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[11] For purposes of this Reply Brief, Mr. Joy assumes, without conceding, that *Howell* and *Martinez* accurately state Idaho law. However, he acknowledges that it is arguable that *Howell* and *Martinez* were incorrectly decided, as the Idaho Rules of Evidence provide one mechanism for admitting prior consistent statements of a witness for purposes of rehabilitation, and that one mechanism is contained within Rule 801(d)(1).

C. The District Court Erred In Refusing To Allow Mr. Joy To Be Rehabilitated With A Prior Consistent Statement

Mr. Joy asserts that "what is good for the goose is good for gander," and that, to the extent that the district court correctly allowed admission of Mrs. Joy's prior consistent statements under I.R.E. 801(d)(1), so too should it have allowed admission of Mr. Joy's prior consistent statements under that Rule. (*See* App. Br., pp.47-48.)

In response, the State offers two arguments: first, it asserts that Mr. Joy's argument is not preserved because he did not specifically identify Rule 801(d)(1), but instead simply argued "it's his own statement"; and second, Rule 801(d)(1)(B) does not apply because Mr. Joy's motive to lie pre-dated the prior statement. (Resp. Br., p.27.)

With regard to the State's first argument, Mr. Joy submits that his argument is preserved. In *State v. Sheahan*, 139 Idaho 267 (2003), the Supreme Court held that "[f]or an objection to be preserved for appellate review, either the specific ground for the objection must be clearly stated *or the basis of the objection must be apparent from the context*." *Id.* at 277 (emphasis added). In this case, the context of defense counsel's argument (immediately following a "hearsay" objection), as well as his argument that "it's his own statement," made it apparent that he was invoking Rule 801(d)(1)(B), the "prior statement by witness" rule in the "hearsay" portion of the Idaho Rules of Evidence.

With regard to the State's second argument, Mr. Joy submits that, whatever the law may be, it ought to be applied equally to both parties. Thus, if Rule 801(d)(1)(B) does not apply where the consistent statement in question did not pre-date the witness's motive to lie, the district court correctly excluded Mr. Joy's prior consistent statement, but it erred in admitting Mrs. Joy's prior consistent statements. On the other hand if Rule 801(d)(1)(B) does apply where the consistent statement did not pre-date the witness's motive to lie, the district court did not err in

admitting Mrs. Joy's prior consistent statements, but it did err in excluding Mr. Joy's consistent statements.

D. The District Court Erred In Admitting State's Exhibit 46 (A Boot Lace)

Mr. Joy contends that the district court erred in admitting Exhibit 46 (a boot lace) because the State failed to lay an adequate foundation for that exhibit. (App. Br., pp.48-51.) In particular, Mr. Joy argues that the State failed to demonstrate that the boot lace is what it was claimed to be, *i.e.*, the same boot lace that Mr. Joy allegedly used to tie up his wife, as is required by I.R.E. 901. (App. Br., pp.48-51.)

In response, the State offers two arguments for affirming the district court's decision to admit Exhibit 46. First, the State argues that Mr. Joy's "foundation" objection at trial was insufficient to preserve his current argument on appeal. (Resp. Br., pp.27-28.) Second, the State contends that Mr. Joy's argument fails on its merits because the foundation laid at trial was adequate to support the exhibit's admission. (Resp. Br., pp.28-29.)

Mr. Joy intends to respond only to the State's first argument (concerning preservation) since its second argument (concerning the merits) is adequately addressed in his Appellant's Brief (pp.50-51). With regard to the State's first argument, *Sheahan, supra*, held that an issue is preserved for appeal if "the basis of the objection [is] apparent from the context." *Sheahan*, 139 Idaho at 277. Indeed, in *Sheahan*, the defendant's counsel objected to admission of certain testimony on the basis of "foundation" and the Court held that, under the circumstances, that objection sufficiently overlapped with the argument made on appeal that the testimony was inadmissible as habit evidence (because no habit had been shown). *Id.* Likewise, in this case, although the trial objection did not explicitly identify Rule 901, the "foundation" objection sufficiently overlaps with the foundation argument, made based on Rule 901, presented on appeal. Indeed, even if the Court considers (as the State would have it do (*see* Resp. Br., p.28))

that defense counsel supported her "foundation" objection with an argument concerning Mrs. Joy's sister-in-law being the one who turned the boot lace over to the police, the fact is that this is still part of the authentication or "foundation" requirement of Rule 901, which is the issue asserted on appeal. Rule 901(a) states the general rule that the proponent of a piece of evidence bears the burden of showing that that evidence is what the party claims it is; Rule 901(b) then provides examples of means by which the proponent of a piece of evidence can meet this burden, including by offering "[t]estimony of a witness with knowledge that a matter is what it is claimed to be." I.R.E. 901(b)(1). Thus, even if defense counsel's objection and argument are read very narrowly as relating solely to the fact that the boot lace was turned over to the police by someone without personal knowledge as to whether that boot lace is what the State wanted the jury to believe that it was, counsel's objection and argument still fell within the ambit of Rule 901, which is the subject of this appeal. Accordingly, there is little doubt that Mr. Joy's argument is properly before this Court.

E. The District Court Erred In Allowing The Prosecutor To Elicit Irrelevant, Highly Prejudicial Testimony, Which Was Outside The Scope Of Direct Examination, While Questioning Mr. Joy

Mr. Joy contends that the district court erred in allowing the prosecutor to question him concerning the fact that he was required to attend alcohol treatment classes because that line of inquiry was outside the scope of his direct examination. (App. Br., pp.51-54.) As part of his argument, he asserted that this line of inquiry was irrelevant and highly prejudicial because it not only suggested to the jury that he had a drinking problem, but also that he had committed a crime or some other bad act which resulted in him being required to attend treatment. (App. Br., p.54.)

In response, the State implicitly concedes that this line of inquiry from the prosecutor went beyond the scope of direct examination, as it argues only that this questioning was proper because it related to matters affecting Mr. Joy's credibility. (*See* Resp. Br., p.31.) Specifically,

the State asserts that "[w]hether it was Joy and not his wife who was required to attend alcohol abuse treatment are matters that bear directly on Joy's credibility—whether the jury could trust him to tell the truth, the *whole* truth, and nothing but the truth." (Resp. Br., p.31 (emphasis in original).)

The State's argument is without merit. It appears to turn on the mistaken impression that evidence of alcohol abuse and other bad acts can validly be used to show that a witness is unworthy of belief. However, that is simply not the case. *See* I.R.E. 404(a) (limiting the use of character evidence); I.R.E. 404(b) (limiting the use of "prior bad act" evidence); I.R.E. 609 (limiting the use of prior convictions).

F. The District Court Erred In Allowing The Prosecutor To Question Mr. Joy Concerning Another Witness's Beliefs

Mr. Joy contends that the district court erred in allowing the prosecutor to question him concerning why his son holds certain beliefs. (App. Br., pp.55-58.) The basis of this argument is that this was a matter his personal knowledge and, therefore, pursuant to I.R.E. 602, he should not have been required to speculate as to how his son came up with the beliefs in question. (App. Br., pp.57-58.)

In response, the State argues that the prosecutor's repeated (and argumentative) questions about how Mr. Joy's son developed certain beliefs were just an "awkwardly phrased" attempt to ask whether Mr. Joy had given his son reason to develop those beliefs.[12]

[12] The State also quotes from Idaho Rule of Evidence 702, which provides that lay witnesses can offer reasonable opinions and inferences, so long as they are rationally based on their own perceptions, helpful to the jury, and not based on any specialized knowledge. (Resp. Br., p.32 (quoting I.R.E. 702).) However, because the State makes no discernible argument with regard to Rule 702, no response is provided herein.

Mr. Joy disagrees with the State's interpretation of the prosecutor's line of inquiry; however, the transcript speaks for itself and Mr. Joy simply refers this Court back to the relevant portion of the trial transcript. (*See* Tr., p.597, L.15 – p.599, L.18.)

G. The District Court Erred In Allowing The Prosecutor To Badger Mr. Joy While Cross-Examining Him

Mr. Joy contends that the district court allowed the prosecutor to badger him on the witness stand by repeatedly asking him essentially the same question, over and over, even after he had repeatedly stated that he could not answer that question. (App. Br., pp.58-60.) In response, the State has characterized the prosecutor's question not as being harassing, but rather, as "a perfectly reasonable line of inquiry designed to elicit specific details from a witness in order to test that witness's veracity and credibility." (Resp. Br., pp.33-34.)

Although Mr. Joy disagrees with the State's characterization of the prosecutor's questioning, the fact is that the trial transcript speaks for itself. Thus, Mr. Joy simply refers this Court back to the relevant portion of the trial transcript. (*See* Tr., p.637, Ls.5-25.)

IV.

The District Court Erred In Refusing To Instruct The Jury On The Lesser Included Offenses Of Misdemeanor Domestic Battery And False Imprisonment

A. Introduction

Mr. Joy contends that the district court erred in refusing to instruct the jury on two lesser-included offenses: misdemeanor domestic battery and false imprisonment. In his Appellant's Brief, he argued that these offenses are lesser-included offenses of felony domestic battery and second degree kidnapping, respectively, and that the requested instructions should have been given because a reasonable view of the trial evidence would support findings that Mr. Joy committed the lesser offenses but not the greater offenses. (App. Br., pp.61-67.) He also argued

that the district court's error in failing to give these lesser-included offense instructions was not per se harmless. (App. Br., pp.67-73.)

In response, the State concedes that misdemeanor domestic battery and false imprisonment are lesser-included offenses of felony domestic battery and second degree kidnapping, respectively, but it argues that the district court did not err failing to instruct the jury as to these lesser-included offenses because the trial evidence does not support a conclusion that Mr. Joy is guilty of the lesser offenses, but not the greater offenses. (Resp. Br., pp.34, 35-38.) The State also offers a brief assertion that, to the extent that the district court did err, that error is harmless. (Resp. Br., pp.38-39 n.8.)

Mr. Joy contends that the State's arguments are completely without merit. Below, Mr. Joy offers brief arguments as to certain flaws in the State's reasoning. With regard to the balance of the flaws in the State's reasoning, Mr. Joy refers this Court back to his Appellant's Brief.

B. The District Court Erred In Refusing To Instruct The Jury On The Lesser Included Offense Of Misdemeanor Domestic Battery

The State claims that there is no reasonable view of the evidence that would have supported a finding that Mr. Joy committed the lesser offense of misdemeanor domestic battery (battery without traumatic injury) without having committed the greater offense of felony domestic battery (battery with traumatic injury). (Resp. Br., pp.37-38.) This argument is based on the State's assumption that the jury's choice in this case was binary, *i.e.*, it could either accept Mrs. Joy's version of events or it could accept Mr. Joy's version of events. (*See* Resp. Br., pp.37-38.) However, the State's argument is without merit because, as was fully explained in Mr. Joy's Appellant's Brief (pp.63-64), the jury's choice was not binary at all. The jurors could have easily believed that Mr. Joy acted in self-defense at times but exceeded the level of

force reasonable and necessary for self-defense at other times. Under this scenario, the jury could have concluded that the State failed to prove a nexus between any excessive actions on Mr. Joy's part and any of Mrs. Joy's "traumatic injuries" (as those injuries could have been attributed to Mr. Joy's reasonable defensive actions or Mrs. Joy's own aggressive behavior).

C. The District Court Erred In Refusing To Instruct The Jury On The Lesser Included Offense Of False Imprisonment

The State also claims that there is no reasonable view of the evidence that would have supported a finding that Mr. Joy committed the lesser offense of false imprisonment without having committed the greater offense of second degree kidnapping. (Resp. Br., pp.36-37.) Again, the State's argument is based on the assumption that the jury's decision in this case was purely binary in that it could either choose to believe Mrs. Joy or Mr. Joy. (*See* Resp. Br., pp.26-27.) However, as was explained in Mr. Joy's Appellant's Brief (pp.65-67), this was not the case; the jury could have found that the truth lay somewhere between the two stories. Specifically, the jury could have believed that Mr. Joy lacked the *intent* to detain Mrs. Joy against her will and, as such, was not guilty of kidnapping, but that he nevertheless restrained her liberty.[13]

[13] Notably, the State appears to be confused as to the distinction between second degree kidnapping and false imprisonment, asserting that the additional element that the former offense contains, which the latter offense does not, "is the intent to *secretly* confine." (Resp. Br., p.36 (emphasis in original); *accord* Resp. Br., p.35 n.6.) However, "secret confinement" is only one of the possible objectives that are enumerated as part of the intent element of the crime of kidnapping (the others being the intent to send the victim out of state or the intent to "in any way h[o]ld [the victim] to service or [be] kept or detained against his will"). *See* I.C. § 18-4501(1); *see also State v. Evans*, 72 Idaho 458, 461-65 (1952) (explaining that secret confinement is not always an element of kidnapping, as it is just one way of describing the intent element of the crime). And is not the one that Mr. Joy was charged with in this case. (*See* R., p.51 (information charging second degree kidnapping by "seiz[ing] and/or confin[ing] Jennifer Joy with the intent to cause her to be kept or detained against her will").)

D. The District Court's Error In Failing To Instruct The Jury On The Lesser-Included Offenses Of Misdemeanor Domestic Battery And False Imprisonment Was Not Harmless[14]

Although it was probably not his burden to do so (as it is the State's burden to prove harmless error), in his Appellant's Brief, Mr. Joy explained why the district court's error in refusing to give the requested lesser-included offense instructions in this case was not *per se* harmless. In doing so, Mr. Joy identified certain Court of Appeals decisions, including *State v. Hudson*, 129 Idaho 478 (Ct. App. 1996), which had suggested that, based on the "acquittal first" theory, errors in failing to instruct juries on lesser-included offenses will always necessarily be harmless, and he argued extensively that the reasoning of those cases should not compel a harmlessness determination here because the reasoning of those cases is unsound and has never been embraced by the Idaho Supreme Court. (App. Br., pp.67-73.)

In response, the State offers no actual argument. Instead, it simply asserts the following in a footnote:

> Even had the district court erred by declining Joy's instructions on the lesser included offenses, such error would necessarily be harmless. See State v. Hudson, 129 Idaho 478, 480-81, 927 P.2d 451, 453-54 (Ct. App. 1996) ("any error in the district court's failure to give the [lesser included offense] instructions is harmless under the 'acquittal first' requirement of I.C. § 19-2132(c)").

(Resp. Br., pp.38-39 n.8.)

As the State has offered no meaningful response to Mr. Joy's argument as to why *Hudson* (and other cases of a similar ilk) does not compel an automatic conclusion of harmlessness, no further response is required herein. Rather, Mr. Joy simply refers this Court back to pages 67-73 of his Appellant's Brief, wherein he explained why a finding of *per se* harmless is not warranted.

[14] Again, Mr. Joy incorporates herein the harmless error standard discussed in Part I(C), *supra*, and Part IV(E) of his Appellant's Brief.

V.

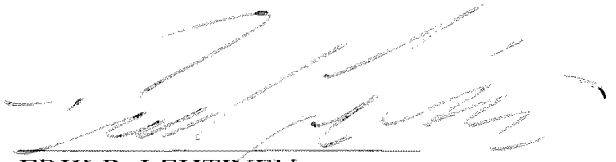
The Accumulation Of Errors In This Case Deprived Mr. Joy Of A Fair Trial

In his Appellant's Brief (p.74), Mr. Joy argued that to the extent that this Court finds the district court's errors in this case to be individually harmless, it should find that the accumulation of errors deprived him of a fair trial under the "cumulative error" doctrine, and it should remand his case for a new trial. Although the State contests this assertion, its argument in this regard is unremarkable and no reply is necessary herein. (*See* Resp. Br., p.39.) Thus, Mr. Joy simply refers this Court back to page 74 of his Appellant's Brief.

CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Mr. Joy respectfully requests that this Court vacate his convictions and sentences, and that it remand his case for a new trial on the charges for which has not yet been acquitted.

DATED this 3rd day of August, 2012.



ERIK R. LEHTINEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of August, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

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EVAN A. SMITH
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ERL/eas